



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

James R. Paschall
Senior General Attorney



Writer's Direct Dial Number

(757) 629-2759
fax (757) 533-4872

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via fax 202 565-9004
and original and 10 copies via DHL Express

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20006

ENTERED
Office of Proceedings

AUG 29 2006

Part of
Public Record

Re: STB Docket No. AB-290 (Sub-No. 254X), Norfolk Southern Railway Company - Discontinuance of Service Exemption - In Stanly County, NC
STB Docket No. AB-290 (Sub-No. 274X), Yadkin Railroad Company - Discontinuance of Service Exemption - In Stanly County, NC
STB Docket No. AB-149 (Sub-No. 2X), Winston-Salem Southbound Railway Company - Discontinuance of Service Exemption - In Stanly County, NC
Reply to Motion for Protective Order

Dear Mr. Williams:

Norfolk Southern Railway Company, Yadkin Railroad Company and Winston-Salem Southbound Railway Company, Petitioners in the above dockets, submit for consideration the enclosed Reply in opposition to the Motion for Protective Order filed by Alcoa, Inc. in these proceedings on Friday, August 25, 2006.

Very truly yours,

James R. Paschall

Enclosures

cc via e-mail attachment and DHL: Mr. Michael F. McBride
Attorney for Alcoa, Inc.



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-290 (Sub-No. 254X)

Norfolk Southern Railway Company -
Discontinuance of Service Exemption - In Stanly County, NC

STB Docket No. AB-290 (Sub-No. 274X)

Yadkin Railroad Company -
Discontinuance of Service Exemption - In Stanly County, NC

STB Docket No. AB-149 (Sub-No. 2)

Winston-Salem Southbound Railway Company -
Discontinuance of Service Exemption - In Stanly County, NC

Petitioners' Reply in Opposition to Alcoa's Motion for Protective Order

Norfolk Southern Railway Company, Yadkin Railroad Company and Winston-Salem Southbound Railway Company, Petitioners in the above dockets, submit this Reply in opposition to the Motion for a Protective Order filed by Alcoa, Inc. on Friday, August 25, 2006 in these proceedings.

In a decision served August 11, 2006 in the subject dockets, the Board granted Petitioners an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to discontinue service over 11.11 miles of rail line between Halls Ferry and Badin in Stanly County, NC.

Alcoa discloses in its motion that it plans to file a petition to the Board to reopen

the decision on the merits. In that petition, Alcoa wishes to submit transportation contract(s) or contract rates to which NSR is a party, but not necessarily the only party other than Alcoa, as well as other rates or revenue to variable cost ratios of Alcoa traffic transported by third-party railroads not involved in this proceeding for comparison. This confidential submission of rate information or the third-party rates or revenue to variable cost ratios would be for the stated purpose of supporting a previous showing (or perhaps a showing now) that revenue to variable cost ratios for the rates under which Alcoa's traffic moves over the line demonstrate that Petitioners' rail service over the line is profitable. Alcoa asserts the Board materially erred in not recognizing this. On the contrary, the Board properly viewed the revenue to variable cost ratios submitted by Alcoa with respect to its traffic as unsubstantiated. Moreover, those ratios are irrelevant, not in accordance with the Board's abandonment costing regulations and do not demonstrate that Petitioners did not use the proper methodology in their financial evidence. Alcoa did not refute Petitioners' showing that the revenues from Alcoa's traffic were insufficient to profitably support the operations and maintenance of the subject Line nor would that revenue be sufficient to achieve a profitable operation of the line in the forecast year. Along with other findings, the Board's finding with respect to the financial evidence in the record in these dockets supported the Board's decision to grant the exemptions. The Board's decision contains no material error.

Board decisions in abandonment or discontinuance proceedings are administratively final upon the date they are served. 49 CFR § 1152.25(e)(2). Parties seeking further administrative action may file a petition to reopen the proceeding under 49 CFR § 1152.25(e) (4). 49 CFR § 1152.25(e)(2)(i). The Board will grant a petition to

reopen only upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error. 49 CFR § 1152.25(e)(2)(ii).

The evidence for which Alcoa seeks a protective order because Alcoa wishes to introduce it in its petition to reopen is not new evidence. Alcoa indeed admits that the evidence and documentation it seeks to introduce is not new, but includes documents it used or relied upon to make or to support the calculations that Alcoa submitted in its reply to the joint petitions for exemption in these dockets. Alcoa's justification for not previously submitting this newly raised evidence or supporting documents is weak at best. In any event, the contracts or supporting information at issue would have been irrelevant and would not have produced a material change in the Board's decision even if Alcoa had produced them at the proper stage of the proceeding.

Newly raised evidence is not the same as new evidence. *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X), STB served December 15, 2005; *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663 (9th Cir. 1989) *citing Union Mechling Corp. v. United States*, 185 U.S. App. D.C. 57, 566 F.2d 722, 726-27 (D.C.Cir. 1977) and *citing to see generally United States v. Northern Pacific Railway Co.*, 288 U.S. 490, 493-94, 77 L. Ed. 914, 53 S. Ct. 406 (1933) and cert. denied *Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093, 110 S. Ct. 1166, 107 L. Ed. 2d 1069 (1990); *Platnick Brothers, Inc. v. Norfolk & Western Railway Co.*, 367 I.C.C. 782, 785 (1983). New evidence must in fact be new. Thus, evidence that was reasonably available to the parties before and during the

proceeding is not new evidence for purposes of a petition to reopen. *Platnick Brothers*, 367 I.C.C. at 785.

"A party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened so that it may introduce that evidence." *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34013, STB served July 26, 2002.

Alcoa can not evade the strict limitations on the submission of new evidence by arguing that the submission of the newly raised evidence here is required to show that the Board committed material error in the August 11, 2006 decision on the merits. If the Board erred in that decision (which it did not) because it did not have available evidence or supporting papers that Alcoa chose not to submit previously even though some of its assertions were based on those papers, Alcoa cannot expect the Board to allow the newly raised evidence to show that material error was made in the prior decision. The Board's decision on the merits was made upon the record of facts and arguments submitted by the parties and under the applicable statute, regulations and precedent. Alcoa should not be allowed to submit newly raised, but not new, evidence to supplement and strengthen its case in an effort to prove the alleged material error.

Alcoa cites no authority to support its motion. Petitioners have searched publicly available STB decisions and ICC decisions since the effective date of the Staggers Act and have found no decision in a rail line abandonment or discontinuance of service proceeding involving a request by either the railroad or by any opponent of the abandonment or discontinuance for a protective order for the submission of

transportation contracts or rate agreements or the rates in those agreements.¹ The absence of such decisions is not surprising because these contracts have no confidential terms or provisions that are needed to prepare an opposition pleading or to refute financial evidence submitted by the railroads in accordance with the Board's costing regulations for abandonment or discontinuance proceedings or are of any other possible relevance in an abandonment or discontinuance proceeding.

Indeed, we found only a few references to transportation contracts at all in a search of STB and ICC decisions in abandonment or discontinuance cases since the effective date of the Staggers Act. Most of these references note the expiration of transportation contracts or the lack of transportation contracts for shipments over the subject line. Thus, the railroads lacked any guarantee of any future traffic over the line. The few other abandonment or discontinuance cases that mention such contracts do not cite them for their use in any sort of financial calculation material to the agency's decision on an abandonment or discontinuance application or petition.

Moreover, the rates or revenue to variable cost ratios for the rates, or even the costs and revenues, of connecting carriers on their railroads, whether or not part of a joint haul in part over the subject line, can not be of any possible relevance to the profitability of the subject line under the Board's abandonment costing regulations.


We should clarify that while we stated via e-mail to Alcoa's counsel that we

¹In fact, the very few protective orders that the Board has issued in abandonment or discontinuance proceedings and that we have found in researching Board decisions deal with the financial status of parties submitting offers of financial assistance, letters of intent to buy a line or of agreements to buy a line, not the merits of the abandonment or discontinuance case. This motion is unique in that regard.

thought any confidential information should be kept confidential, we also stated that we thought it was "neither relevant nor appropriate for this contract to be filed with the STB in the context of this case and in any petition." The concluding words "to reopen" were inadvertently omitted from this sentence but we assume this would have been understood in context. While we did not authorize Alcoa to state our position on this motion, we did reply as to what it was.

While we appreciate that Alcoa appears not to be directly suggesting that the Board force Petitioners to expend resources on outside counsel or consultants, which would be quite unusual in an abandonment proceeding, the Board should not directly or indirectly require such an outcome by granting a protective order for which that would have that effect. Moreover, regardless whether the information Alcoa seeks to keep confidential would be given to NSR in a manner in which Petitioners could reply to a petition to reopen in order to avoid the adverse effect of the Board accepting the information but denying it to Petitioners unless they hire outside counsel or consultants to handle it, Petitioners request that the Motion for Protective Order be denied for the reasons related to new evidence and relevance stated above.

Respectfully submitted,



James R. Paschall
Attorney for Petitioners
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510
(757) 629-2759
Fax (757) 533-4872

Dated: August 28, 2006

CERTIFICATE OF SERVICE

I certify that the foregoing reply to Alcoa Inc.'s Motion for a Protective Order in STB Docket Nos. AB-290 (Sub-No. 254X), AB-290 (Sub-No. 274X) and AB-149 (Sub-No. 2X) has been served on Mr. Michael F. McBride, LeBoeuf, Lamb, Greene & MacRae LLP, 1875 Connecticut Avenue, N.W., Washington, DC 20009, Attorney for Alcoa, Inc., via e-mail and DHL Express, this 28th day of August, 2006.


James R. Paschall

Dated: August 28, 2006